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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

COMPANIA ANOMINA VENEZOLANO DE NAVEGACION,

Petitioner,

versus

WILLIAM H. MATTHEWS and J. P. FLORIO & CO., INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on January 31, 1967, (rehearing denied March 2, 1967), which affirmed a final decree by the United States District Court for the Eastern District of Louisiana. The decree in behalf of the libelant longshoreman for personal injuries, held the vessel unseaworthy, and further exonerated the third-party defendant, the stevedore employer, under the *Ryan*[1] doctrine.

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[1] 350 U.S. 124, 100 L. Ed. 133 (1956).

OPINIONS OF COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has been reported at 371 F. 2d 971 a copy whereof is annexed hereto as "Appendix A". The findings of the District Court are reported at 234 F. Supp. 553 (1964).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U. S. Code 1254. A timely petition for rehearing was denied on March 2, 1967, and this petition for certiorari is accordingly filed less than ninety days after denial of the rehearing petition.

QUESTIONS PRESENTED

A) Does the decision of the Court of Appeals conflict with the rule and decision of this Court in *Italia Societa Per Azioni Di Navigazione v. Oregon Stevedoring Company, Inc.*?[2]

B) Does the decision of the Court of Appeals directly conflict with the decisions of other Circuits, and should it accordingly be reviewed by the Supreme Court?

C) Did the District Court and the Circuit Court of Appeals fail to make crucial findings of fact?

STATEMENT OF THE CASE

The decision of the Court of Appeals in allowing recovery by the plaintiff is deficient in that no findings have ever been made in this proceeding as to the place where the accident occurred, or the time thereof, which are crucial for the reasons hereinafter set forth. The decision of the Court of Appeals is also erroneous in denying recovery over against the third-party defendant under the *Ryan*

[2] 376 U.S. 315, 11 L. Ed. 2d 732 (1964).

doctrine, in light of the decision in *Italia vs. Oregon, supra.* Further, the holding is at variance with decisions of the Second, Fourth and Ninth Circuits, particularly the Second Circuit, in *Anthony Albanese v. N. V. Nederl. Amerik Stoomv. Maats,*[3] and *Hugev v. Dampskisaktieselskabet International.*[4]

In *Hugev* the Court recognized that stevedores are usually given full use and charge of the ship's hatches and holds, and it must do its work with reasonable safety to persons and property, and that the vessel owner does not waive any such protection unless it is guilty of "any unreasonable or material prevention of performance."

The stevedore employer in seeking to perform its contractual warranty of loading cargo in a workmanlike manner over a period two hours, compelled its longshoremen, including the libelant, to work in a place which the District Court found to be unsafe at the commencement thereof. The stevedore was in complete charge of this loading operation aboard the vessel in the port of New Orleans, which began at 8:00 A.M., and hence the stevedore had ample time, namely, two full hours, within which its Superintendent and foreman on the scene could easily have arranged for a safe place within which the longshoremen could work, even under the facts as found by the District Court.

When the work began the hold was barren, save for some dunnage,[5] an ordinary and normal situation. An entire tier of cargo cases had been brought in by the longshoremen over a period of two hours.[6] The duty to stow properly and to maintain a safe place for the longshore-

[3] 346 F. 2d 481 (1965).
[4] 170 F. Supp. 601, affirmed by Ninth Circuit, 1960 A.M.C. 591; certiorari denied, 363 U.S. 803.
[5] See Court of Appeal, Appendix A, p. 2.
[6] R. 72

men to work was imposed on the stevedore by the decisions of this Court in *Ryan v. Pan Atlantic.*[7] The record is barren of any factual findings as to whether the disputed scene of the accident was in Hold No. 2 or in Hold No. 4, or whether it happened in the lower hold or tween decks, thus giving four important potentials which, because of different cargoes in each space, is a crucial question. The stevedore had complete charge and worked under the supervision of their foreman, as the Superintendent clearly testified[8] that he was responsible for the entire loading operation.

Even under the findings of fact by the District Court, the Court of Appeals' decision does violence to the decision of this Court in *Italia v. Oregon, supra,* in addition to violating the following decisions of the other Circuits:

Smith v. Jugosalvenska Linijska Plovidea, 278 F. 2d 176 (4th Cir., 1960).

DeGioia v. United States Lines Company, 304 F. 2d 421, 2nd Cir., 1962).

Albanese v. N. V. Nederl. Amerik Stoomv. Maats, 346 F. 2d 481 (1965); *Crescent W. & Co. v. Comp. Nav. DeBaja Calif.,* 1966 A.M.C. 2670, 2677 (9th Cir.).

Seattle Stevedore Company v. Compania Maritima, 373 F. 2d 9 (9th Cir. 1967).

That the record discloses that the stevedores were in complete charge of this operation from 8:00 A.M. until the accident happened at 10:00 A.M., is borne out by the uncontradicted testimony of their Superintendent Schroth. (Note R. 534, 588 et seq.)

Therefore, (a) the record is devoid of any findings as to where the accident happened and when; (b) the Court

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[7] 350 U.S. 124, 100 L. Ed. 133 (1956); see, also Hugev, supra.
[8] R. 533, 534, et seq.

of Appeals violated *Italia v. Oregon*, and (c) also violated decisions of other circuits.

REASONS FOR GRANTING THE WRIT

1. *Importance of the Question.*

This Honorable Court has handed down a long list of decisions interpreting the implied warranty of workmanlike service owned by the contracting stevedore to the owner of the vessel on which the stevedore performs its services, *Ryan Stevedore Co. v. Pan Atlantic S.S. Corp., supra*, but the factual questions involved in the present case have not heretofore been presented to this Court.

Under the well-recognized conditions in the industry, the stevedore contractors, upon entering a hold for a loading operation, must prepare that hold by placing aside whatever dunnage might be found in the hold, (or by removing it entirely) and then proceeding with the work.[9] In this case they had loaded for two hours.

It is, therefore, of great importance to the shipping industry for this Court to define the scope of the stevedore's responsibility to the vessel owner for the manner in which the stowage is accomplished, as when a hole in the stow results from the loading operation under the exclusive control of the stevedore.

The presence of dunnage is common in any merchant vessel, and it is fundamental that stevedores should require their longshoremen, working under their foreman and Superintendent, to handle such dunnage in a manner so as not to cause any threat to the safety of its own employees. A mere statement by a vessel officer to keep the dunnage in the hold is of no moment.

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[9] Hugev, *supra*.

In *Italio v. Oregon* this Court observed that where the injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk, whereas the stevedore is not, and declared:

> "But we deal here with a suit for indemnification based upon a maritime contract, governed by federal law, *American Stevedores, Inc. v. Porello, supra*, in an area where rather special rules governing the obligations and liability of shipowners prevail, rules that are designed to minimize the hazards encountered by seamen, to compensate seamen for the accidents that inevitably occur, and to minimize the likelihood of such accidents.
>
> **"By placing the burden ultimately on the company whose default caused the injury,** *Reed v. The Yaka*, 373 U.S. 410, 414, 10 L. Ed. 2d 448, 452, 83 S. Ct. 1349, we think our decision today is in furtherance of these objectives." (Emphasis supplied.)

It is common knowledge that union rules do not permit any of the vessel's personnel in any hold during loading operations and, hence, for a period of two hours in this case, the stevedore went about their work under the sole guidance of the foreman and Superintendent, and any alleged request for any ship's officer to permit the dunnage to remain in the hold, can have no legal effect of shielding the stevedore from his contractual responsibility under the law because he is obligated to handle the dunnage in a proper manner, and with full regard for the safety of the longshoremen.

2. ***Conflict in Decisions of the Court of Appeals.***

The Circuit Court's decision is diametrically opposed to the Second and Fourth Circuit in *Albanese v. N. V. Nederl, supra*, in which the Second Circuit observed:

> "Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the warranty, it seems plain that it must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough. *Misurella, supra. Weyerhaeuser S.S. Co. v. Nacirema Operating Co., Inc.*, 355 U.S. 563, 567, 78 S. Ct. 438, 2 L. Ed. 2d 491. There was no evidence of active 'hindrance' by the ship. I.T.O. could either have ordered the men out of the hold when it discovered that conditions were becoming dangerous and the ship's blowers were not turned on, or it could have used its own portable blowers.
>
> "The judgment is set aside, on both the complaint and the claim over, and the case is remanded to the District Court for trial."

There is likewise no evidence here that the shipowner's fault prevented or seriously handicapped the stevedore in his ability to do a workmanlike job. Whatever fault might be attributable to the statements by the vessel's Mate constituted at best a mere condition and did not prevent or seriously handicap the stevedore in executing his contract.

As in *Seattle Stevedore Company (supra)* there can be no question that the stevedore "through its foreman, (it) was fully aware of the conditions presented by the stow of cargo and **directed the manner** and provided the gear used in the particular stowage operations * * *." (Emphasis supplied). There the Ninth Circuit held:

> "[1] Since *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc.*, 376 U.S. 315, 84 S. Ct. 748, 11 L. Ed. 2d 732 (1964), there can be no reasonable doubt that the stevedore's implied warranty to the shipowner is governed by the same standard as and is coextensive with the shipowner's obligation to seamen and others in that

> category. There, the Court, in sustaining a judgment of indemnification for the shipowner against the stevedore, invoked the same test to determine whether the stevedore had breached his implied warranty of performance as it used in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960) to determine whether a shipowner in a suit by a seaman had breached his duty to provide a seaworthy ship. *Italia*, 376 U.S. at 322, 84 S. Ct. at 753."

The decision of the Court of Appeals likewise contradicted the other decisions of the Fourth and Second Circuits in *Smith v. Jugosalvenska Linijska Plovidea; DeGioia v. United States Lines Company; Albanese v. N. V. Nederl Amerik Stoomv. Maats; Crescent W. & Co. v. Comp. Nav.* and *Hugev, supra.*

In *Crescent*, the Ninth Circuit declared:

> "Assuming that Compania's actions constituted a breach of its contractual obligations, the evidence here justifies a finding of a waiver of said breach."

In this contractual situation, with its attendant warranty, the stevedore had the usual exclusive possession of all holds, and the stevedore is under the decisions of this Court, as well as the decisions of the other Circuits answerable and chargeable under the law. The decision of the Court of Appeals is, therefore, grotesque in light of the decisions cited above. If the ship's officer was in anywise at fault, it was a condition and not a cause.

3. *Lack of Proof.*

The decisions of both the Circuit Court and the District Court are woefully deficient in salient facts in that they fail to place the location or time of accident, both of which are very significant. The reason is that these factual

situations as to place and time were argued in both courts and as yet no findings have been made as to either. A serious gap in the chain of relevant evidence has resulted.

The records show clearly that the longshoremen had been working whatever hold it was, for this remains undecided, for over two hours, and had laid one tier of cargo before any semblance of an accident took place.[10] Further, the stevedore's own Superintendent explained the situation in Hold No. 2 tween deck and placed the scene of the accident there, for his men had first loaded the lower hold.[11] Hence, the record is bereft of indispensable facts upon which to predicate liability under the law, and, moreover, clearly shows the stevedore to have been in complete charge. The District Court handed down two sets of findings and found in the first set and repeated in the second that "loosely piled and covered dunnage must be removed before stowage of cargo to insure a safe footing for longshoremen." While this speaks of the obligation of the shipowner to the longshoreman this is not applicable as concerns the obligations vis-a-vis the shipowner and the stevedore contractor. This was the duty of the stevedore under the well established line of decisions since *Ryan*. The warranty of seaworthiness has never been extended to the stevedore contractor but only to the longshoreman. Therefore, to hold that the stevedore had no control over the vessel is a glaring error, for, under the very findings, the dunnage which should have been removed was not removed, and this responsibility can be laid only at the door of the stevedore for breach of his contract and no where else. This is particularly true when the test used to determine whether the stevedore has breached his implied warranty of performance is the same as that used to deter-

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[10] R. 533.
[11] R. 534.

mine whether a shipowner in a suit by a seaman had breached his duty to provide a seaworthy ship. (See, *Italia (supra); Seattle Stevedore Company (supra)).*

There being no evidence on which to predicate initial unseaworthiness, and the findings being totally deficient as to time and place, it is impossible to conclude logically where the accident happened, that is, was it on the main deck, or in the lower hold of the sternmost hatch, and in what hatch? All hatches contained varying types of cargo.

Further, without clear evidence and findings showing liability of the shipowner to the longshoreman there can be no basis of concluding, without more, that the stevedore contractor is exonerated of his contractual duty to indemnify the shipowner.

CONCLUSION

As interpreted by the decision of this Court to the Court of Appeals, the decision by the Court of Appeals in this case is contradictory to the strong public policy of imposing upon the stevedore a solemn duty to protect its workmen from injury in its hazardous occupation.

A shipowner is subject to liability upon the warranty of seaworthiness, and is, therefore, responsible for the latent dangers caused by the stevedore and against which he cannot protect himself. But as a corollary, the ultimate burden is upon the party thus able to eliminate the hazard, said this Court in *Italia Societa Per Azioni Di Navigazione v. Oregon Stevedoring Company, Inc., supra,* for the steve-

dore was in the best position to avoid the accident, and hence, is the more vulnerable under the law.

For the foregoing reasons, petitioner prays that this writ of certiorari be granted.

Respectfully submitted,

LEON SARPY and
PAUL A. NALTY

By:_____

1500 National Bank of
Commerce Bldg.,
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Of Counsel:
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CERTIFICATE

I hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari has this day been delivered in person to all counsel of record on this _____ day of _____, 1967.

CHAFFE, McCALL, PHILLIPS,
BURKE, TOLER & HOPKINS

By:_____

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22220

COMPANIA ANONIMA VENEZOLANO de NAVEGACION,

Appellant,

versus

WILLIAM H. MATTHEWS, ET AL,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(January 31, 1967.)

Before GEWIN and AINSWORTH, Circuit Judges, and HUNTER, District Judge.

HUNTER, District Judge: Matthews, a longshoreman, filed a libel in personam to recover damages for personal injuries. The defendant shipowner impleaded J. P. Florio and Company, Inc. for whom Matthews was working at the time of his injury. The trial judge's decision was for the plaintiff (longshoreman), against the shipowner, and in favor of the impleaded stevedore. The shipowner only appeals, assigning as error the district judge's findings that the vessel was unseaworthy; alternatively, the Court's failure to allow recovery over against the stevedore contractor under the Ryan rule; and in the

further alternative, for failure to find Matthews contributorily negligent.

The following facts, as found by the district court, were clearly established by the evidence:

II.

The libellant was engaged in the stowage of cargo in one of the hatches of said vessel.

III.

Libellant and his co-workers found, upon the removal of the hatch covers, a large quantity of loose dunnage which had come into port with the vessel. This dunnage was piled unevenly and loosely, about 2 feet to 4 feet high, and covered over with brown paper.

IV.

Libellant and his co-workers requested that the dunnage be removed. These requests were transmitted by Florio employees to the vessel's mate in charge of stowing cargo. The mate ordered that the dunnage remain in the hold, and that libellant *and* his co-workers build cargo to the height of the dunnage and work over it. They were further ordered to build up to the height of the dunnage in the square of the hatch.

V.

Libellant was required to stow cargo over the loosely piled paper covered dunnage, and to do so it was necessary that libellant walk over the paper covered dunnage. Libellant was unable to stow cargo as ordered without walking over and on the dunnage.

VI.

While libellant and a co-worker carried cargo for stowage over the covered dunnage, as ordered, libellant's right foot and part of his right leg went through the paper covering into a concealed hole or separation in the loose dunnage. The hole or separation into which libellant fell was created by the loosely piled condition of the dunnage, was covered by paper, could not be seen by libellant, and constituted a trap.

VII.

Loosely piled and covered dunnage must be removed before stowage of cargo to assure a safe footing for longshoremen.

VIII.

Eight witnesses and the libellant testified to the above facts, and not one witness contradicted their testimony.

IX.

A qualified expert on seamanship testified without contradiction that the method employed by the respondent herein on the date of libellant's injury was unsafe.

X.

J. P. Florio & Co., Inc. did not cause the condition that resulted in the accident and injury, and had no control over the vessel, the dunnage or paper covering over the dunnage, prior to the accident and injury.

XI.

The presence of the loose, covered dunnage in the hold during loading operations, for which the vessel alone was responsible, rendered the vessel unseaworthy, and created an unsafe place for libellant to work. Libellant was in-

jured as a proximate result of such unseaworthiness and unsafe condition.

XII.

The unseaworthiness of the vessel and the failure of the respondent to provide libellant with a reasonably safe place to work were the sole and exclusive legal causes of the accident and libellant's resulting injury, no negligence being legally attributable to libellant.

Beaten on the facts, the shipowner turns hopefully to the law books, and contends under *Ryan* and *Italia*[1] the continued performance by the stevedore under the conditions found to be existing is ample reason to hold the stevedore as a matter of law. The cited decisions are, on their facts, so different from the circumstances of our case that they have no persuasive value. *Ryan* held no more than the shipowner could recover over from the stevedoring company, by invoking the legal formula of warranty, where the unseaworthiness for which the shipowner is liable resulted from a breach of the stevedoring company's implied warranty of workmanlike service. In *Italia*, the stevedore had been hired to load and unload Italia's vessels and to supply the ordinary equipment necessary for those operations. The defective rope which created the condition of unseaworthiness on the vessel and rendered the shipowner liable to the stevedore's employee was supplied by the stevedore. The District Court denied indemnity. The Court of Appeals for the Ninth Circuit affirmed on the ground that a stevedore's implied warranty is not breached in the absence of a showing of negligence on his part. The Supreme Court reversed, holding that where the injury-producing defective equipment is

[1] Ryan Stevedoring Co., Inc. v. Pan-Atlantic SS Corp., 1956, 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133; Italia Socita etc. v. Oregon Stevedoring Co., 1964, 376 U.S. 315, 84 S. Ct. 748, 11 L. Ed. 2d 732.

furnished by and under the control of the stevedore, the shipowner could recover on the basis of a breach of the implied warranty of workmanlike service without proving actual negligence.

We agree with the shipowner that his failure to have cleared the hold of excess dunnage or put it out of the way would not, per se, prevent the shipowner from recovering indemnity. Ordinarily, the failure of the stevedore to clear away faulty dunnage could result in a conclusion by the fact finder that it breached its warranty to load in a workmanlike manner. *Mortenson v. A/S Glitter* (2nd Cir., 1965), 348 F. 2d 383. Here, the fixing of liability lies in the findings of fact. The libellant and his co-workers requested that the dunnage be removed. These requests were transmitted to the vessel's mate in charge of stowing cargo, who insisted that the dunnage remain in the hold and that libellant and his co-workers work over it. It has been recognized that indemnity may and should be denied when the shipowner or those operating the vessel determined the conditions under which work was to be done and ordered the stevedore to proceed with the work under those conditions. *Thompson v. Trent Maritime Company* (3rd Cir., 1965), 353 F. 2d 632; *Moore-McCormack Lines, Inc. v. Maryland Ship Ceiling Co.*, (4th Cir., 1962), 311 F. 2d 663; *Hodgson v. Lloyd Brasileiro Patrimonio Nacional* (3rd Cir., 1961), 294 F. 2d 32; *United States v. Harrison* (9th Cir., 1957), 245 F. 2d 911. There is no difficulty as to the law. When the Court found that the vessel determined the conditions under which work was to be done; that the hole into which Matthews fell was not readily apparent and constituted a trap; and that the stevedore had no part in all of this, then there was warrant for applying the Weyerhaeuser corollary to the *Ryan* doctrine of stevedore-shipowner indemnity and concluding

that the shipowner's conduct is "sufficient to preclude recovery of indemnity."[2]

Our attention is directed towards a determination of whether the findings are sufficient in view of the court's failure to state the precise location aboard the ship where the accident happened. The nature and degree of exactness of the findings depend on the circumstances of the particular case. We think the findings here are ample to provide a basis for the decision. *Kelley v. Everglades Drainage District*, 319 U.S. 415, 63 S. Ct. 1141, 87 L. Ed. 1485; *Weber v. McKee* (5th Cir., 1954), 215 F. 2d 447; *United States of America v. Jacobs* (5th Cir., 1962), 305 F. 2d 906.

The judgment is AFFIRMED.

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[2] Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc., 355 U.S. 563, 78 S. Ct. 438. The language quoted has been labeled by this court as the "Weyerhaeuser dictum." See Waterman Steamship Corporation v. David, 353 F. 2d 660.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1343

COMPANIA ANONIMA VENEZOLANO DE NAVEGACION,

Petitioner,

versus

WILLIAM H. MATTHEWS and
J. P. FLORIO & CO., INC.,

Respondents.

OPPOSITION TO PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, William Matthews, respectfully prays that this Honorable Court reject petitioner's application for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in proceedings numbered 22,220 of the docket of said court, affirming the judgment of the United States

District Court for the Eastern District of Louisiana, New Orleans Division, Honorable Herbert W. Christenberry, Judge, presiding.

The opinion of the United States Court of Appeals for the Fifth Circuit has been reported at 371 F. 2d 971 and a copy is annexed to the petition as "Appendix A". The findings of the District Court are reported at 234 F. Supp. 553 (1964).

JURISDICTION

The jurisdiction of this Court, as stated by petitioner, is conceded.

QUESTIONS PRESENTED

The questions raised by petitioner, on page 2 of its petition, are presented by *petitioner* as follows:

(A) Does the decision of the Court of Appeals conflict with the rule and decision of this Court in *Italia Societa Per Azioni Di Navigazione* v. *Oregon Stevedoring Company, Inc.*?

(B) Does the decision of the Court of Appeals directly conflict with the decisions of other Circuits, and should it accordingly be reviewed by the Supreme Court?

(C) Did the District Court and the Circuit Court of Appeals fail to make crucial findings of fact?

Respondent Matthews, the injured longshoreman herein, has no direct interest in the recovery over by the shipowner against the stevedore. Hence, QUESTIONS (A) and (B) supra, relating solely to recovery over, will be touched upon only lightly, en passant. With reference to Matthews, the only "QUESTION" purportedly presented by the petition is (C) above, relative to the alleged failure of the District and Circuit Courts to "make crucial findings of fact."

STATEMENT OF THE CASE

As noted by the Fifth Circuit in its opinion herein: "Beaten on the facts, the shipowner turns hopefully to the law books, . . ." etc., (371 F. 2d 971.) In its application for certiorari here, however, petitioner has presented the factual issues in such unrecognizable form, that it is necessary to refer rather extensively to the findings of the District Court as they appear at page 972 of 371 F. 2d:

"The following facts, as found by the district court, were *clearly established* by the evidence:

II.

The libellant was engaged in the stowage of cargo *in one of the hatches* of said vessel.

III.

Libellant and his co-workers found, upon the removal of the hatch covers, *a large quantity of loose dunnage which had come into port with the vessel.* This dunnage was piled unevenly and loosely, about 2

feet to 4 feet high, and *covered over with brown paper.*

IV.

Libellant and his co-workers *requested that the dunnage be removed.* These requests were transmitted by Florio employees to the vessel's mate in charge of stowing cargo. THE MATE ORDERED THAT THE DUNNAGE REMAIN IN THE HOLD, AND THAT LIBELLANT AND HIS CO-WORKERS BUILD CARGO TO THE HEIGHT OF THE DUNNAGE AND WORK OVER IT. They were further ordered to build up to the height of the dunnage in the square of the hatch.

V.

Libellant was required to stow cargo over the loosely piled paper covered dunnage, and to do so it was necessary that libellant walk over the paper covered dunnage. Libellant was unable to stow cargo as ordered without walking over and on the dunnage.

VI.

While libellant and a co-worker carried cargo for stowage over the covered dunnage, as ordered, libellan't right foot and part of his right leg went through the paper covering into a concealed hole or separation in the loose dunnage. The hole or separation into which libellant fell was created by the loosely piled condition of the dunnage, was covered by paper, could not be seen by libellant, and constituted a trap.

VII.

Loosely piled and covered dunnage must be removed before stowage of cargo to assure a safe footing for longshoremen.

VIII.

EIGHT WITNESSES AND THE LIBELLANT TESTIFIED TO THE ABOVE FACTS, AND NOT ONE WITNESS CONTRADICTED THEIR TESTIMONY.

IX.

A qualified expert on seamanship testified without contradiction that the method employed by the respondent herein on the date of libellant's injury was unsafe.

X.

J. P. Florio & Co. Inc., did not cause the condition that resulted in the accident and injury, and *had no control over the vessel*, the dunnage or paper covering over the dunnage, prior to the accident and injury.

XI.

The presence of the loose, covered dunnage in the hold during loading operations, for which the vessel alone was responsible, rendered the vessel unseaworthy, and created an unsafe place for libellant to work. Libellant was injured as a proximate result of such unseaworthiness and unsafe condition.

XII.

The unseaworthiness of the vessel and the failure of the respondent to provide libellant with a reasonably safe place to work were the sole and exclusive legal causes of the accident and libellant's resulting injury, no negligence being legally attributable to libellant." (Emphasis added)

The balance of the findings of fact deal primarily with quantum, which is not challenged here.

ARGUMENT

RESPONSE TO QUESTION (C), supra — INADEQUACY OF FINDINGS BY DISTRICT COURT & CIRCUIT COURT

As noted in bare outline below, the "ship" here pursued an erratic and zigzag course, as did the merchant vessel in World War II when cruising in dangerous waters. The danger here to the "instant ship" is the relentless and implacable foe: the submarine of truth. The chase is at an end, we trust, and this should be the final shot.

RULE AS TO ADEQUACY OF FINDINGS:

The Fifth Circuit, in quickly disposing of this third "Question" ((C) supra) cited several cases, none of which states the rule more clearly nor any differently than the statement in *GYPSUM CARRIER, INC. V. HANDELSMAN*, C.A. Cal. 1962, 307 F. 2d 525:

> "Findings in admiralty should be sufficiently specific to permit fair appellate review of

the manner in which the trial court resolved issues upon which its judgment depends; but error in regard to specificity of findings MUST BE PREJUDICIAL TO JUSTIFY REVERSAL." (Emphasis added)

The complete lack of prejudice here quo ad the findings is demonstrated, first of all, by the fact that the *"when"* and the *"where"* of the accident was an *afterthought* which only crept into the case as a flimsy barrier of defense. Quite obviously, the District Court, brushed aside this counterfeit query as to "where" the accident happened in Finding II, supra. Despite the last minute desperate efforts by the shipowner to inject a frivolous fact issue, the District Court simply stated:

> "The libellant was engaged in the stowage of cargo *in one of the hatches of said vessel.*" (Emphasis added)

Obviously, the Fifth Circuit found neither *lack of specificity* nor any *requisite prejudice* to warrant the shipowner's complaint. The libel had not specified in which hatch the accident had occurred. (R. 2, Articles V and VI) Nor did the shipowner's answer raise or challenge the *"where"* or *"when"* issue in the slightest perceptible manner. On the contrary, after a simple denial of Articles V and VI, supra, the ship agreeably "went along" with the description of the broad "where" of the accident by stating that Matthews had been injured:

> *"* * * in one of the vessels holds."* (R. 10)

It was not until Matthews himself had testified, and after all of his eight witnesses to the accident had been heard, that there was raised the issue as to which hatch was involved. This issue was raised for the first time, when Matthews was being cross examined regarding a statement he had made in a deposition, in which he had said, long before trial, that the accident occurred in hatch No. 4 (R. 480).

All other witnesses who made any mention of *which hatch* was involved as the situs of the accident had described it as being Hatch (or hold) No. 2. There was no conflict at trial about this point at all because, immediately after Matthews was confronted with his deposition reference to Hatch No. 4, supra, the Court itself disposed of this inconsequential discrepancy as follows:

> "The Court: Look, are you sure it was Number 4 hatch?
> The Witness: *That's my recollection.*
> The Court: You can't be mistaken?
> The Witness: *I COULD BE MISTAKEN ABOUT WHAT HATCH I WAS IN.*" (R. 480)

MATTHEWS WAS THE *LAST* WITNESS TO THE ACCIDENT CALLED BY THE LIBELLANT. (Index of witnesses R. 422).

There was no serious challenge made on this point to any witness, before or after the testimony of Matthews as to "where" the accident happened. Realizing that the *inside* of any hatch looks much the same to a longshoreman preoccupied with his personal problems, (plus the time lag between the discrepancy as to

Hatch number given at deposition long before the trial) the Court let the matter drop with the single, above quoted passage.

THE PARALLEL DEVICE OF CONFUSION AS TO "WHERE" THE ACCIDENT HAPPENED

As just noted, the petitioner, surrounded by the testimony of eight uncontradicted witnesses as to which numbered hatch or hold was the situs of the accident, did not make the slightest discernible impression upon either the District Court or the Fifth Circuit. Shifting to an even more transparent device, the shipowner sought to pull off a sort of "hidden ball" play based upon a document referred to as the "Commodity Handling Report" or "Work Sheet" (R. 536).

We say that this document was used in a hidden ball play in a very appropriate sense:

First of all, the document was one made in the course of business of the stevedore, Florio, and was used as a means of bringing in a mass of strictly hearsay evidence via Florio's superintendent Schroth. (R. 531) But, in some sort of undetectable "hand off" play, the shipowner ended up with the "ball" seeking to score two touchdowns simultaneously. The document was sought to be used as a means of discrediting the claim of unseaworthiness (quo ad Matthews) and establishing the validity of the recovery over against Florio. To depart from the gridiron figure of speech, this audacious maneuver amounted to this:

Both the shipowner and the stevedore, Florio, produced a grand total of ONE LIVE WITNESS, Florio's superintendent Schroth. (R. 531)

Another witness, Garcia, a mate, appears only by way of deposition. The testimony of both of these witnesses may be characterized as largely hearsay. Thus:

AS TO SCHROTH — THE SUPERINTENDENT

Schroth admitted that he did not recall if he was on duty on the day of the accident. Besides giving his name, his job title and his general knowledge of the overall facts of life from the view point of a superintendent, he contributed very little factual information to the case. (R. 532)

About midway in his testimony, the Court realized that Schroth was not actually relating factual knowledge of his own but was relying almost entirely upon what was supposed to be reflected by a document described interchangeably as the "Commodity Handling Report" or the "work sheets." He was reeling off information from the "Commodity Handling Report" which he held in his hand, when the Court stopped him with the query:

> "The Court: You can't remember? You're reading this from this document?" (R. 536)

The Court then noted that Schroth had not made the report himself (R. 536). As otherwise developed it was elsewhere admitted by Schroth that he did not know who made up or filled in the document. (R. 586)

It was not even signed, it was covered with erasures and the only actual identification of it was the fact that it was made out on a printed form and the entries corresponded with the general facts of the accident. (R. 603)

The offer of this "Commodity Handling Report" or "worksheet" was somewhat belatedly objected to, once it was discovered how weak the identification was under either the "shop book rule" or the Business Records Act (28 USCA Sec. 1732).

The Court allowed the offer of this document in evidence, obviously on a very tentative and qualified basis "for whatever it was worth". (See rule of HARTZOG V. U.S. 217 F.2d 706)

But the Court could not have thought the "Commodity Handling Report" amounted to much, as actual evidence, because it is not even discussed in the Findings, either at the District Court level or Fifth Circuit level. Neither Court was bemused, by the deception essayed by this device. The "Commodity Handling Report" defense amounted, in general to this sort of argument:

The accident could not have happened in the lower hold as all the eyewitnesses said it did:

(a) Because the lower hold must have been covered over at the time that the Matthews gang was working and consequently they could not have been down there;

(b) There was no distinction made, in some of the testimony by the eyewitnesses (longshoremen), as to

whether they were referring to the 'tween deck area or the lower hold.

This argument, based upon a document which simply cannot stand intelligent inspection, is as flimsy as a child's paper boat.

Nevertheless, should this totally discredited and bedraggled "report" (which was unnoted by either court below,) be examined by this Court, along with, or apart from the mass of other exhibit material, it will surely be found to have an internal contradiction which defies an answer. For, if the lower hold was closed over at the time shown thereon, then *another longshore gang,* working somehow in this tomblike, sealed-off hold, (Exhibit F-11) must have been suffocated.

A realistic answer suggests itself: Nobody died from lack of air and the "which deck" argument is simply blown away by the strong winds of cold reason.

"WHEN" THE ACCIDENT HAPPENED

One of petitioner's complaints as to the District and Circuit Courts alleged failure to make "crucial" findings refers to "when" the accident happened. Nothing in petitioner's application is more frivolous. The Florio "Accident Report" (Exhibit F-13) and the testimony of all of the eyewitnesses shows that the accident happened sometime after 8 A. M. and before Noon on October 18, 1959. The time is pin-pointed at approximately 9:30 A. M. by most of the longshoremen and the time, "9:30 A. M." is noted on the face of the Florio

"Accident Report" itself. We shall not devote further comment to this "question."

AS TO GARCIA, THE DEPOSED MATE

At the outset, in discussing the "Questions" presented by the application for certiorari, we stated that we would touch only lightly on the issue of the claim over by the shipowner against the stevedore. Ironically, the shipowner which here complains of lack of specificity as to the Findings fails to come forward with the slightest explanation in any Court as to why the testimony of the *wrong mate* was produced to support the claim over.

What the mate did and said and, the orders given by him, related to the sole issue which the Fifth Circuit said is controlling as a distinction between *Italia* and the other cases.

Yet Garcia, the only mate who testified (via deposition and before the confusing maneuvers could be detected in detail) *was obviously the wrong mate.* He went off duty at 8 a.m. (Garcia deposition.) The Matthews gang did not report for duty until that precise time, 8 a.m. (R. 483) Garcia, therefore was absent, not only from the Courtroom but from the scene of all the action when the crucial and controlling orders were given as to what should be done with the dunnage, etc. Garcia states that he does not recall any such orders. No wonder. Another mate gave the orders. We received no "message 'from' Garcia."

CONCLUSION

William Matthews has had to endure a great deal of misfortune, over and above the gross negligence of the shipowner and the resulting crippling injury which, among other things, required *two laminectomy operations*. He has also suffered by the additional bad luck of having his obviously just award delayed for an unreasonably long time by:

(a) The evasive and confusing tactics of the shipowner in the District Court, the Fifth Circuit and here; and

(b) The delay of more than one year in preparation of the transcript for appeal, when the Court stenographer unaccountably "misplaced" his notes and quit the Court's employ.

The accident here occurred on *October 18, 1959*, and suit was filed *October 14, 1960*. Trial on the merits was finally reached on *October 28th and 29th, 1963*.

The District Court rendered its decree in favor of Matthews on *October 14, 1964*, and the Fifth Circuit affirmed the decree on *January 31, 1967*. The record reflects (R. 423) that on the date of accident Matthews was 36 years old, the father of eight children and for a period of three years preceding his injury, he had earned more than $5,300 annually. His income since that time has never reached $2,600 (a year) and now, although MORE THAN SEVEN YEARS HAVE PASSED SINCE HE WAS TOTALLY AND PERMANENTLY DISABLED, Matthews continues to wait.

For the reasons set forth in the District Court's Findings of Fact and, for those stated hereinabove, it is respectfully submitted that petitioner's application for certiorari should be denied. In the alternative, should the Court decide to review the claim for recovery over against the stevedore, Florio, we sincerely submit that William Matthews should not be penalized by any further denial of recovery. Any writ granted herein should be restricted to the sole issue of recovery over.

Respectfully submitted,

John P. Dowling

John P. Dowling,
Attorney for Respondent
William H. Matthews

PROOF OF SERVICE

I, John P. Dowling, attorney for respondent, William H. Matthews, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing brief in opposition to Petition for Writ of Certiorari on Leon Sarpy, Esquire, National Bank of Commerce Building, New Orleans, Louisiana, and A. R. Christovich, Jr., Esquire, American Bank Building, New Orleans, Louisiana, by mailing the same, United States postage prepaid, addressed as hereinabove set forth.

New Orleans, Louisiana, May 17th, 1967.

John P. Dowling

John P. Dowling